No. 10974

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

BRIEF OF APPELLEE

BLAINE B. SHIMMEL
317 Title & Trust Bldg.,
Phoenix, Arizona
Attorney for Appellee

THE MESSENGER PRINTING CO., PHOENIX, ARIZONA

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

CASES

STATUTES

No. 10974

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

E. J. HEBETS,

Appellant,

vs.

BENSON G. SCOTT,

Appellee.

BRIEF OF APPELLEE

APPELLEE'S STATEMENT OF THE CASE UNDER RULE 56

Supplementing Appellant's statement of the case and the basis of jurisdiction, Appellee desires only to show that the summary judgment rendered by the

District Court was properly bottomed on applicable provisions of Rule 56.

Appellant's amended complaint (T. 6) states a claim, first, for a broker's 5% commission and, second, the reasonable value of his services (in the same transaction) in connection with the production of a purchaser for Appellee's real estate. It alleges that a memorandum of the express promise upon which the action was brought was in writing and signed by Appellee (T. 7).

The answer expressly denies the existence of such a memorandum in writing (T. 10). It affirmatively alleges that no memorandum of the promise alleged in the quantum meruit cause of action was ever in writing, signed by Appellee (T. 11).

The Arizona statute of frauds, Section 58-101, Arizona Code Annotated, 1939, set forth on page 5 of Appellant's Brief, proscribes an action "upon an agreement authorizing or employing an agent or broker to * * * sell real property * * * for compensation or a commission * * * unless the promise or agreement * * * or some memorandum thereof shall be in writing and signed by the parties to be charged therewith, or by some person by him thereunto lawfully authorized." Accordingly, the issue raised at the outset was whether there was a memorandum of the alleged promise or agreement, in writing, signed by defendant or some person by him lawfully authorized.

To dispose initially of this controlling issue, the parties produced, on order of court pursuant to Rule 34, all of the writings, written or received by them "in the premesis" (T. 13, 56). These consisted of the documents, numbered 1 to 43, inclusive, attached to Appellee's Motion for Summary Judgment (T. 14-54); and, by formal stipulation (T. 55), the parties submitted these instruments as all of the writings by or between them "in respect of the promise or agreement alleged in plaintiff's amended complaint."

Upon this record, and pursuant to Rule 56 (b), Appellee moved for summary judgment (T. 12); asserting that, upon the pleadings and the admissions of the stipulation on file, there was no genuine issue as to the material fact of the existence, nature or extent of the memoranda relied upon by appellant; the sole issue being one of the sufficiency of such memoranda to represent an actionable promise or agreement. Upon this issue, Appellant claimed judgment as a matter of law.

Having considered the 43 documents stipulated to comprise all the written evidence adducible in respect of the promise or agreement relied upon, the District Court found, as a fact, that they contained no memorandum in writing signed by defendant, or any person by him thereunto lawfully authorized, of any promise or agreement alleged in the amended complaint; from which finding, the Court concluded that the claims alleged in the amended complaint

are, and each of them is, barred by the provisions of Section 58-101, A.C.A. 1939, and ordered summary judgment for defendant (T. 59).

SUMMARY OF ARGUMENT

The writings relied upon to satisfy the statute of frauds (T. 14-54), contain no promise or agreement, or any memorandum thereof, signed by Appellee, employing or authorizing Appellant to sell his land. On the contrary, they expressly negative such an employment; and both Appellant, himself, in concluding the correspondence, and his counsel, in closing their brief, interpret the writings as comprising, at most, a conditional agreement, far from the one alleged in their amended complaint, and of which no evidence at all is contained in the writings.

ARGUMENT

We will not contest Points 1, 2 and 3 of Appellant's Summary of Argument (Brief, 7-8). Nor will we, in respect of Point 4 (Brief, 8), bother to trace the derivation of the Arizona statute of frauds. Whether it was "lifted from California" is quite immaterial, since Appellant's brief points out no distinctive construction in California of the alleged antecedent statute, and our examination of California decisions discloses none. The sole point to be argued, then, is whether the writings signed by Appellee, or anything contained in them, constitute or contain an employment of Appellant to sell Appellee's land

for a commission or compensation, or any memorandum thereof.

The amended complaint alleges that "on or about June 1, 1943, plaintiff (Appellant) was employed by defendant (Appellee) to procure a purchaser for real estate," describing it (T. 6); and that "a memorandum of such promise and agreement * * * was in writing and signed by the said defendant" (T. 7). This is the express *employment* alleged, and the only promise or agreement alleged in the first cause of action. The second cause of action alleges that "on or about the 20th day of September, 1943, plaintiff performed services for defendant, at his request" in the negotiation of a sale of the same real estate. The writing first alleged is denied (T. 10); and the answer alleges that no memorandum of the alleged request was ever signed by Appellee (T. 11).

The 43 writings (T. 14-54), among which the employment must be found, comprise 41 letters and telegrams between Appellant, a Phoenix, Arizona, realtor, or his associates, McNamara and Morse, and Appellee, a resident of San Diego, California. (Number 30 is an Agreement for Exchange, and Number 34 a Purchase Contract, each unexecuted by Appellee). This correspondence commenced on January 8, 1942, ended December 10, 1943. Of the 41 communications, only 12 were from Appellee to Appellant, and of these 12, 4 were purely formal, leaving only 8 documents seriously to be examined for the alleged promise over Appellee's signature.

Before discussing these particular instruments, or the correspondence as a whole, we want, first, to show the interpretation placed upon them by Appellant. On November 15, 1943, long after the alleged agreement, Appellant's broker, Morse, who conducted most of the correspondence, undertook to summarize the transaction. After reviewing what had transpired, he said to Appellee, "We took the above to be a 'gentlemen's agreement' * * *" We will hereinafter discuss this term, and what the courts have made of it. Here we submit it as a glass, furnished by the author of most of the writings, through which they may properly be viewed.

More significant still is the final contention made by counsel, in their opening brief. After alleging an express agreement of employment, and a promise to pay a 5% commission (T. 6-7), and arguing, for 22 pages, that isolated passages from Appellee's letters establish one, they conclude with a reversal of position, amounting to a plain confession of error. They say, pages 22-3:

> "Appellant does not contend that Appellee placed this property in his hands and authorized him to sell it without submitting the deal to the Appellee for his approval. On the other hand, Appellant does contend that Appellee authorized him to obtain and negotiate a deal for the sale of the property, which would be acceptable to the Appellee; that such a deal was made; that Appellee agreed to it with the purchaser with

> whom the Appellant had negotiated the deal; that afterwards the Appellee went back on the proposition he had accepted, and refused to pay the Appellant for the services he had rendered."
>
> (Brief, 22-23)

Of course, this kind of a conditional "authorization" is not at all what the amended complaint alleged. Just as clearly, it is not the "agreement authorizing or employing Appellant to sell real property for compensation or a commission" described in Appellant's First Specification of Error (Brief 6). And it is an entirely different agreement from the one sought to be developed on page 17 of the Opening Brief, where Appellant quotes "excerpts from the correspondence" to "show very definitely that the Appellee authorized and empowered the Appellant to sell his property." Down to the penultimate page of his brief, the entire position of Appellant is that Appellee had expressly authorized him, in writing, to sell his property, on specified terms, for a 5% commission. Then it is suddenly conceded that the prerequisite agreement in writing was only an authorization to submit a deal for Appellee's approval; "to obtain and negotiate a deal for the sale of the property * * * which would be acceptable to the Appellee."

We have, at this early stage, pointed out these admissions of Appellant, before analyzing the writings, because we want to show the Court just what

sort of a promise or agreement should be sought among Appellee's writings. From the pleadings, the stipulation, and down to page 23 of Appellant's brief, we should be looking for an authorization by the owner to the realtor to sell real estate for a commission. We are fairly sure, in advance, that such a commitment will not be found, because, first, Appellant, in concluding the correspondence, says it is, at most, a "gentlemen's agreement" (T. 50); and further, because, in concluding their brief, counsel admit that all they discover among the writings is an authorization "to obtain and negotiate a deal which would be acceptable to Appellee" (Brief 23). We can be absolutely certain that this sort of a promise will not be found, because Appellant makes no attempt to point out where it is contained or implied. He goes on (page 23) to claim "that such a deal was made; that Appellee agreed to it with the purchaser * * *," and afterwards "went back on the proposition." But he cites no word of the record to show even an allegation of this improvised theory and, of course, there is none.

Having in mind these two possibilities to be sought, let us now examine the writings. Do they contain a memorandum, signed by Appellee, of a promise or agreement employing Appellant to sell his land for compensation? Documents 1 to 43 comprise 40 pages of the record (T. 14-54). We will try to avoid argument based upon isolated sentences, without reference to explanatory context. At page 21, Appel-

lant's brief aptly illustrates the impropriety of this practice. It is there argued that Appellee acknowledged employment of Appellant by writing:

> "I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands I shall give you ample time to work out anything you may have in mind."
> (Brief, 21)

Standing alone, this does seem to imply that Appellee's property had been put in Appellant's hands, but the succeeding sentence:

> "At this time, you are the only firm who knows I would consider selling at all."

indicates clearly enough that all *any* realtor knew was that Appellee would *consider* selling, and assuredly negatives any authorization to sell.

In *Henry v. Harker*, 61 Ore. 226, 122 Pac. 298, the Supreme Court of Oregon, on rehearing, adopted a suggestion by counsel that the extensive correspondence there urged as comprising a written authorization from owner to realtor, be paraphrased as a "written conversation between the parties." This Oregon case is close to this one in many respects, particularly in that the realtor concluded by pleading a "gentlemen's arrangement." Treated as such a written conversation, the correspondence here may fairly be boiled down to this:

Document No.

1. *Realtor:* If your land is for sale we would like a listing on it.

2. *Realtor:* I have a party interested in your place. Will you consider a trade?

3. *Owner:* Perhaps you have the wrong impression of this property. I am not trying to sell it. If you have a buyer definitely interested and willing to pay the market price, let me have an offer that is a business one.

4. *Realtor:* I think I understand your position, but nevertheless urge a deal.

5. *Owner:* I will see you when I come to Phoenix; in the meantime, if you have a deal you think would interest me, let me know.

6. *Realtor:* We have an eastern buyer here. Talked with your tenant, Leo Smith, and told him you weren't much interested in selling; he says he has an option on the place. We might get you $225.00 per acre, but would have to be assured we would get 5% commission if we forced a sale to Smith.

(With this, the 1942 correspondence, January 8th to March 26th, concluded. It was not re-

sumed until March, 1943. (T. 21).

9.) *Realtor:* Have offer $90,000.00 cash for your
10.) 360 acres. Wire or phone collect.

11. *Owner:* Thanks for offer. Not enough now. See you in April.

12. *Realtor:* I appreciate you are not offering your property for sale. Have a buyer who wants to offer $235.00 per acre, and would like you to reconsider and give me a definite expression.

13. *Realtor:* Would like definite price for at least ten days.

17. *Realtor*: Your tenant says he will bid against anyone making an offer for your place. I was afraid of this.

18. *Realtor:* Have two prospects. Awaiting letter.

19. *Owner:* I have a moral obligation to Smith, and will write him. In the meantime, just let the deal simmer. I repeat, what I told you in Phoenix, that you are the only broker who will be allowed to do anything on it. If I decide to put it in anyone else's hands, I shall give you ample time to work out anything you have in mind. At this time you are the only firm who

knows I would consider selling at all. If you should develop something that is a deal, shoot me a letter on it. I will do my best to work it out for you. I will give you a letter as soon as I have an answer from Leo Smith.

20. *Realtor:* I appreciate your position with Smith. Also appreciate your kindness in not putting the place in other brokers' hands. But if the place is sold for $300.00 per acre, we will have come nearer earning the commission than Smith. I will put up $100.00 I can sell your place within thirty days from the time you give us a definite commitment.

21. *Realtor:* Have one Kendall interested in your place. Let me hear from you.

24. *Realtor:* Kendall has offered a trade for your place. Think he may pay cash. Let me hear which deal you prefer.

25. *Realtor:* Let me hear from you as to offer.

27. *Realtor*: No word from you. Please give us something definite.

28.) *Realtor:* Kendall has signed trade agreement.
29.) Will even be interested in buying. Come over at once.

31. *Realtor:* Wired you offer. When may we expect you over?

32. *Realtor:* Please answer wire. We need you here.

33. *Owner:* Can't come now, and shall not attempt to do anything until I am in Phoenix. The trade your party has sounds as if I might want it, but again, I can make no decision until I see it. Is this a deal or is it a prospect? If a deal ready to close, I will come over as soon as possible. And Morse, get this straight, no one ever worked on my affairs, or did me a favor, that didn't get just compensation for it; so take it easy, and keep your eyes and ears open for a proposition that will bring us both in an honest dollar or two.

34. *Realtor:* Purchase contract and deposit receipt signed by Kendall; to be binding only when signed by purchaser and seller. (Paragraph Fourth, T. 46.)

35. *Realtor:* Please do not delay longer than necessary. Nervous strain has put Morse in the hospital.

36. *Owner*: Can't get report until next week. Will wire then.

37. *Realtor:* Have had Kendall's $10,000 deposit for twenty days. Still nothing definite from you. We thought we had a "gentlemen's agreement" with you. You are not treating us right to ignore our telegrams and this offer.

38. *Realtor:* Kendall wants acknowledgment of his acceptance your proposition on ranch.

39. *Realtor:* Advise coming over immediately to close deal.

40. *Owner:* Your letters and wires received. I cannot accept your proposition, but have delayed answer, hoping the picture would change. It hasn't at this writing. Can't get to Phoenix before next month. I am not trying to sell this place through or to anyone. My inability to close a deal hasn't the remotest connection with anyone in Arizona, the price of land, or World War II. When I can give you any other news I will write you.

41. *Realtor:* Advise by wire when you can deliver.

42. *Realtor:* If price a factor, believe Kendall would pay $325.00 per acre, if we

could have definite assurance you would close deal. Advise what can be done.

43. *Owner*: Thanks for offer. Price no deciding factor. Impossible to make deal. See you when I come over.

We believe the foregoing paraphrase fairly and accurately reflects all that was written between these parties, and fairly emphasizes all commitments over the signature of Appellee. Before applying to these writings the rules laid down by courts in construing other situations, we want to point out the following outstanding features of the documents here under consideration:

1. All statements respecting price, terms, amount of commission, and such necessary elements of the alleged promise or agreement, are found exclusively in communications from the realtor; not in those signed by the party sought to be charged.

2. In his first letter, the realtor solicited a "listing" of the owner's land. A listing is well known to be a formal, written instrument, authorizing the realtor to sell on specified terms. Throughout the correspondence, this realtor repeatedly sought something definite. On April 7, 1943, he specifically requested a "definite price for at least ten days" (T. 24). As late as July 10, 1943 (forty days after the date of the pleaded employment (T. 6), he was

offering to bet $100.00 he could sell the land "within thirty days from time you give us definite commitment" (T. 32).

3. In his very first reply, the owner cautioned the realtor against the wrong impression. "I am not trying to sell it" (T. 15). This position the realtor said he fully appreciated, in 1942 (T. 16), and again in 1943 (Document 12, T. 22).

4. Until after the owner had finally declined to "accept your proposition at this time" (T. 52), the realtor had at all times referred to his submissions as "offers." Down to November 15, 1943, when he stated his interpretation of the "gentlemen's agreement," his only complaint was that the owner was not "treating us right in ignoring our telegrams and this offer." "This offer" was the Kendall proposal, on which Appellant had then had a deposit "since October 25th" (T. 49).

In our view, all that transpired between these parties should fairly be characterized as diligent pursuit, and persistent submission of offers by the realtor, with full knowledge that the owner was not trying to sell, but would, at most, "try to work out for you" any deal which might be developed. Surely, the realtor never, at any time, acted like a broker with an authorization to sell. Even when he had Kendall's signature and deposit, he submitted the proposal, not as a consumation of his authorization, but as an offer (T. 49).

This conclusion is so inescapable as to have impressed even Appellant's counsel. Manifestly, it was their inability to find, in all the writings producible, any support for the promise or agreement they had pleaded and argued to the last page of their brief, which led them, at the end, to abandon that position and fall back on a nebulous authorization to submit a deal for Appellee's approval—one which "would be acceptable to the Appellee" (Brief, 23).

They go on then to argue "that such a deal was made; that Appellee agreed to it with the purchaser with whom the Appellant had negotiated the deal;" and that Appellee afterwards "went back on the proposition." We agree that the question of performance of the alleged employment is not here involved; all that was raised by the Motion for Summary Judgment was the existence of any memorandum signed by Appellee of the promise or agreement pleaded. Having pleaded and proceeded to the end of his brief on one theory, Appellant may not then shift to another. Of course, the statement "* * * that Appellee agreed to it with the purchaser with whom the Appellant had negotiated the deal * * *" is pure fabrication. The record is that when the Kendall offer was submitted, Appellee's only response was that he "couldn't accept your proposition at this time" (T. 52). But to sustain the summary judgment rendered below, it is only necessary to point out:

1. That the employment pleaded is admittedly

not shown in writing; and

2. That the conditional employment "subject to the Appellee's approval" was not pleaded, relied upon, or even conceived, until the first contention proved itself untenable.

Of the sixteen cases cited in Appellant's brief, all but one are directed to elementary principles of construction with which we have no particular quarrel. Only one, *Curran v. Hubbard* (California Court of Appeal), 114 Pac. 81, is offered to measure a particular writing by the statute of frauds. There, an owner wrote his broker:

> "Ontario, December 6-08. My orange grove is lot 645, Ontario Colony. My price is $12,000. Get me an offer. O. H. Hubbard, 3526 S. Figueroa St." 114 Pac. 81.

The holding that this satisfies the statute of frauds is about as liberal a construction as we find among the hundreds of decisions upon varying states of facts. Obviously, it goes far beyond anything set down by this Appellee. Owner Hubbard did not preface his direct solicitation of an offer with a disclaimer of any desire to sell. Nor did he add that, on receipt of an offer, he would try to work out a deal. For a recent California case, illustrative of many construing a single document, see *Morrill v. Barneson*, 86 Pac. (2d) 924, where a broker relied

on this seemingly complete written authorization:

> "256 Montgomery Street San Francisco, California July 29, 1936 Mr. George E. Morrill 116 Hamlet Street Los Angeles, California Dear Sir: Answering your recent inquiry at my brother's office in Los Angeles concerning the sale of Bailey Ranch, following is the information requested. The ranch consists of approximately 3800 acres. The elevation in general is about 3500 feet, and does not extend into the desert. A copy of the legal description is enclosed, and I think the foreman has a plat at the ranch, which can be seen. Price $50,000, including between 500 and 600 head of cattle. Terms $30,000.00 cash, balance payable $5,000.00 annually, with interest at 6%. The regular 5% commission will be paid. The foreman of the ranch is Mr. Ed Rutledge, and he will show the place. Very truly yours, (signed) Lionel T. Barneson."
>
> 86 Pac. (2d) 925.

Of this language, the District Court of Appeal said:

> "* * * The letter relied upon contains no terms of employment; it was simply an answer to an inquiry concerning the property. The expression in the letter 'The regular 5% commission will be paid,' was nothing more than additional information concerning the terms of sale and informed the broker of the exact amount for which

> the property could be purchased. That the letter did not constitute an employment is well established by the authorities." 86 Pac. (2d) 925.

There is no California rule, liberal or otherwise, as referred to, without citation of authority, at page 12 of Appellant's brief. But examination of California cases does disclose that there is one distinctive feature in that State. California appears to be the only state possessing a statute of frauds similar to Arizona's, in which the memorandum in writing is not required to contain a statement of the amount of the commission promised to be paid. The following California cases so hold:

> *Kennedy v. Merickel*, 8 Cal. App. 378, 97 Pac. 81;
>
> *Muncy v. Thompson*, 26 Cal. App. 634, 147 Pac. 1178;
>
> *Moore v. Borgfeldt*, 96 Cal. App. 906, 273 Pac. 1114.

In practically every other state where the statute is silent as to the necessity of stating the amount of the commission in the memorandum, it is held that this is an essential part of the contract of employment and that if it does not appear, the memorandum is insufficient, even though it shows an employment. The earliest case, and probably the leading one on this question, is that of *Zimmerman v.*

Zehendner, 164 Ind. 466, 73 N. E. 920, 3 Ann. Cases 655. This has been followed in *Jacobs v. Copp*, 123 Ohio State 146, 174 N. E. 353; *Black v. Milliken*, 143 Wash. 204, 255 Pac. 101; *Oregon Home Builders v. Crowley*, 87 Oreg. 517, 170 Pac. 718, 171 Pac. 214.

While there is no Arizona decision on this precise point, by the weight of authority the memorandum must express not only the employment, but the amount of commission payable. This Appellee made no mention of any commission in any writing, but since his writings fail to establish the employment itself, we will not elaborate the finer point.

Nor will we ask the Court to compare many of the numerous cases construing memoranda in writing. We have already cited *Henry v. Harker*, an Oregon case involving an extensive exchange of letters remarkably parallel to those here under consideration. As in the present case, the Oregon broker concluded by charging a breach of a "gentlemen's arrangement." The lengthy correspondence is set out in the first opinion, 118 Pac. 205; digested as a "written conversation" in 122 Pac. 298. The Supreme Court of Oregon applied the following language, readily applicable here:

> "* * * We do not have presented to us the case of a property owner anxious to sell and seeking a broker to act for him, but rather an active and enterprising broker seeking to induce an indifferent owner to allow him to sell

his property on commission."

Another Oregon decision, *Great Western Land Co. v. Waite*, 171 Pac. 193 (former opinion, 168 Pac. 927), is devoted entirely to construing seven letters between owner and broker. Although the statute there involved required the entire contract to be in writing, the case is applicable upon this Appellant's contention that Appellee confirmed the alleged understanding by his silence (Brief, 16). We submit the following statement of the Oregon court as equally controlling here:

> "Moreover, as we have shown, the plaintiff approached the owner in the character of a buying broker and agent, acting and proposing to act for a party not disclosed. There is nothing in the writings on either side showing that the defendant ever assented to any change of front on the part of plaintiff." 171 Pac. 194.

As closely analogous under similar statutes, we cite, without discussion, *Loefler v. Friedman*, 57 New York NYS 281, 26 Misc. Rep. 750; *Thomas v. Maryfield*, 7 Kans. App. 669, 53 Pac. 891; *Ryan v. Ball* (Tex.), 177 S. W. 226; *Johnson v. Whalen*, 13 Okla. 320, 74 Pac. 503, and *Wienhouse v. Croon*, 68 Conn. 250, 36 A. 45.

CONCLUSION

The point, and the sole point, relied upon by Appellant on this appeal is that Documents 1 to 43, inclusive, "constitute a sufficient memorandum of an agreement authorizing and employing plaintiff (Appellant) as a broker to sell real property to take the said agreement out of the operation of the statute of frauds * * *" (T. 64, 69).

The parties having stipulated that said documents comprise all the evidence of such a memorandum, there is no issue as to any material fact, and the point appellant elected to rely upon raises only a question of law for the Court. Upon that question of law, we submit that the District Court correctly ordered summary judgment, which should be here affirmed, because the documents signed by Appellee negative, rather than establish, the promise or agreement alleged; of which the best proof is that all Appellant can sift out of the writings is a "gentlemen's agreement"; all his counsel can make of them is an "if-and-when" agreement, neither pleaded nor relied upon, but conspicuously disproved by the writings themselves.

Respectfully submitted,

BLAINE B. SHIMMEL
317 Title & Trust Building,
Phoenix, Arizona
Attorney for Appellee.